CHEW SIEW LIE (F)

v.

JET AGE CONSTRUCTION SDN. BHD.

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[COMPANIES (WINDING-UP) NO. 28-51-91]
3 JANUARY 1994

COMPANY LAW: Winding-up petition - Whether relationship of creditor-debtor existed - Whether petitioner had the locus standi to present the petition - Petition opposed by creditors - Whether just and equitable to wind-up the respondent - Whether petitioner had shown special circumstances to warrant a winding-up order - Whether petitioner had alternative remedy - Respondent claiming to be insolvent - Whether respondent's claim substantiated - Consideration of s. 217 (1)(b) & s. 304 of the Companies Act 1965.

The petition before the Court was for an order to wind-up the respondent and appointment of a liquidator on the ground that the respondent, a developer, had failed to build and deliver a house purchased by the petitioner under an agreement for which agreed damages were payable by the respondent to the petitioner. The petition was supported by 9 creditors and opposed by 9 judgment creditors, all unsecured. The respondent did not dispute the petition as it claimed to be insolvent. The opposing creditors alleged *inter alia* that there was fraudulent trading by sale of the land to one Oakfield Enterprise Sdn. Bhd., which claimed ownership, after the respondent had already entered into sale and purchase agreements with various purchasers. Various orders obtained by the opposing creditors against the respondent were pending enforcement.

The main issues before the Court were in respect of the petitioner's *locus standi* to present this petition and if affirmative, whether it was just and equitable to wind up the respondent in view of the possible detrimental effect to the relevant parties.

Held:

[1] Although no action had been filed by the petitioner, it was clear that the petitioner was entitled to damages, though yet to be quantified and as the claim was undisputed, the Court was of the view that there existed the creditor-debtor relationship. Under s. 217(1)(b) of the Companies Act 1965, the petitioner could be considered a prospective creditor of the respondent and could petition the Court for a winding-up order. In the circumstances the Court ruled that the petitioner had the *locus standi* to present the petition.

[2] In view of the various orders to be executed, the Court found that it was not just and equitable to grant a winding up order as it would have the undesirable effect of negativing the several Court orders and would put a stop to all enforcement proceedings which would prove detrimental to the opposing creditors.

[3] The petitioner had been unable to show any special circumstances to warrant a winding-up order but was at liberty to enforce her claim by other modes.

[4] The respondent through its director deposed that it was insolvent but no evidence was adduced to that effect other than a bare statement and the respondent had yet to account for the money in respect of the sale of the land to Oakfield Enterprise Sdn. Bhd. in view of the allegation of fraudulent trading.

[Petitioner's application dismissed with costs to be borne by petitioner and supporting creditors].

Cases referred to:
Ganda Holdings Bhd. v. Pamaron Holdings Sdn. Bhd. [1989] 2 MLJ 346 ***(refd)***
Re P. & J. Macrae, Ltd [1961] 1 All ER ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 304

Other sources referred to:
Mallal's Supreme Court Practice, p. 590, para 48/1/6
Palmer's Company Law, Vol. 1 25th. Edn., p. 888
The Law of Company Liquidation, Mc Pherson J, 3rd. Edn., p. 45

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co.
For the 9 judgment creditors - J.W. Tan; M/s. Tan & Tan
For the official assignee - Latip, Official Assignee's Office, Johor Bahru

JUDGMENT

Haidar Bin Mohd Noor J:

The petitioner, Chew Siew Lie (f) filed the petition on 15 September 1991 for an order that Jet Age Construction Sdn. Bhd. (formerly known as Jet Age Freighters Sendirian Berhad), the respondent be wound up and that a Liquidator may be appointed. In addition thereto, the petitioner and all supporting creditors be allowed

the costs of and incidental to the winding-up which is to be taxed by the proper officer of the Court and be paid out of the assets of the respondent.

The ground of the petition is that the respondent, as developer, undertook to complete the building of a dwelling house on a piece of land known as H.S (D) 19209 by 23 January 1982 for a purchase price of RM65,000 under the agreement dated 24 July 1980 and the respondent failed to build and deliver the said house. Under clause 16 of the agreement, the respondent agreed to pay 8% interest per annum as agreed damages on the total purchase price of RM65,000 from the date of failure to complete the building of the house that is, on 23 January 1982. On 5 August 1991 Oakfield Enterprise Sdn. Bhd's solicitors wrote to the then solicitors of the petitioner, M/s. Foo & Woon stating that the said land belonged to them and not the respondent and hence leaving nothing to the petitioner.

The petition is opposed by nine judgment creditors (encl. 13 to 21) and their solicitor, Mr. Tan Jin Wah in his affidavit (encl. 23) sets out at paragraph 2, the grounds in objecting to the petition to wind up the respondent. The respondent, through its director, Aris bin Mohamed filed an affidavit (encl. 25) supporting the petition on the ground that the respondent is insolvent. Mr. Ong Ban Chai, Counsel for the petitioner also mentioned on behalf of nine supporting creditors (encl. 26).

In this petition there are two issues that I need to consider. They are:

(1) Whether the petitioner is a creditor who is entitled to present this petition.

(2) If the answer to (1) is in the affirmative, whether it is just and equitable to make a winding up order.

Issue (1).

The relevant provision is s. 217(1)(b) of the Companies Act 1965 ("the Act") which reads:

> 217(1) A company (whether or not it being wound up voluntarily) may be wound up under an order of the Court or the petition of -
>
> (a) ...
>
> (b) any creditor, **including a contingent or prospective creditor, of the Company**;
>
> (emphasis is mine)

The word 'creditor' is not defined in the Act. In that event it would appear that in considering who in law can be treated as a creditor, the facts of each case have to be examined to appreciate whether the relationship of a creditor and a debtor exists. (*Ganda Holdings Bhd. v. Pamaron Holdings Sdn. Bhd.* [1989] 2 MLJ 346). Mc Pherson J. in his book **"The Law of Company Liquidation"**, 3rd. Edn., at p. 45 sums up the situation as follows:

> It is obviously not easy to formulate a test, at once both simple and comprehensive, for determining who is entitled to apply for a winding up in capacity of creditor. **The applicant must be one who has a claim to be paid a sum of money by the Company, but that sum need not be liquidated and it need not be presently payable.** Nor is it essential that it should be recoverable by action for in *Re North Bucks Furniture Depositories Ltd.* [1939] Ch. D. 690, a local authority, to which the company was indebted for unpaid rates, was held entitled to present a petition, although payment of its rates could be enforced by distress and not by action.
>
> (emphasis is mine)

In the present case the respondent is not disputing that there was a breach of the agreement with the petitioner, that is, failure to complete the building of the house on 23 January 1982 for RM65,000 and that the petitioner had paid a total sum of RM22,750 as on 15 June 1982 towards the purchase of the piece of land together with a dwelling house known as H.S. (D) 19209 for T.L.O. 10363, Township of Johor Bahru. By clause 16, the respondent agreed to pay 8% interest per annum as agreed damages on the total purchase price of RM65,000 from the date of failure to complete the building of the house on 23 January 1982. It is not disputed that there has been no action filed by the petitioner against the respondent. The respondent through the affidavit of its director Aris bin Mohamed (encl. 25) supported the winding up. Aris in his affidavit sets out the civil suits in which judgments had been given to the tune of RM485,217.93 and other civil suits pending to the tune of RM890,649.26. Aris deposed that the respondent is insolvent.

Even though there has been no action filed by the petitioner, it would seem clear that the petitioner is entitled to damages, though yet to be quantified, and the respondent did not dispute the claim and in that event, in my view, there exists the creditor-debtor relationship.

The petitioner under s. 217(1)(b) of the Act could be considered a prospective creditor of the respondent and accordingly may petition to Court for a winding-up order. In the circumstances I rule that the petitioner has the *locus standi* to file the present petition.

Issue (2)

In this petition we have the situation where there are nine supporting creditors and nine opposing creditors (encl. 26). The opposing creditors through their Counsel, Mr. Tan Jin Wah by way of his affidavit (encl. 23) at paragraph 2, sets out the grounds opposing the petition for winding-up order. All the creditors are unsecured creditors. A number of authorities were cited by both Counsels to support their contention for the Court to exercise its discretion in their respective direction. In this respect Upjohn LJ in *Re P. & J. Macrae, Ltd* [1961] 1 All ER said at p. 309:

> Reported cases can only be quoted as examples of the way in which in the past Judges have thought fit to exercise the discretion, and judicial decision cannot fetter or limit the discretion conferred by statute or even create a binding rule of practice.

I would in the circumstances have to examine the grounds put forth by the petitioner and the creditors and see whether it is just and equitable that the respondent be wound up or otherwise.

According to the affidavit of Mr. Tan Jin Wah, the opposing creditors' judgments against the respondent were entered *vide* civil suits no. 354/80, 337/80, 351/80, 363/80, 45/81, 62/81 and 123/81 (see exhibit 'TJW2'). Pursuant to the order of specific performance, the opposing creditors paid into Court a total sum of RM162,429 (see exhibit 'TJW4'), 7 properties for which specific performance was ordered by the Court have been transferred into the names of the opposing creditors whereas in 3 cases the respondent has failed to deliver the original title deed. The opposing creditors subsequently filed an application for accounts dated 18 July 1989 pursuant to the order of the Court (see exhibit 'TJW5'). However, the application for account was dismissed by the Senior Assistant Registrar on 12 November 1989. An appeal to the Judge in chambers against the decision of the Senior Assistant Registrar is still pending (see exhibit 'TJW6'). The order for accounts, if obtained, will show the financial position of the respondent especially when the respondent sold the land held under Grant 72 Lot 83 Mukim of Plentong, Johor for RM2,086,000 on 10 March 1987 (see exhibit 'TJW7'). What then happened to the money?

It was further submitted that the respondent has now filed accounts up to 1990 (see encl. 25). The opposing creditors had obtained an order for examination of the officers and former officers of the respondent (a copy of the order dated 22 April 1990 was produced by the learned Counsel). It would appear that there could be a possibility of fraudulent trading by the sale of the land to Oakfield Enterprise Sdn. Bhd. on 30 June 1986 by the respondent when the respondent had entered into sale and purchase agreements with the various purchasers of various lots together with the buildings on the same piece of land. If it is true then it would attract s. 304 of the Act. According to **Palmer's Company Law,** Vol. 1, 25th. Edn., at p. 888:

> Any director who is a party to a fraud or to the commission of any other tort is personally liable to the injured party. .... The company may also be liable, but that does not exonerate the director.

According to **Mallal's Supreme Court Practice** at p. 590, para 48/1/6:

> Officer of Corporation. This includes a former officer.

It was further submitted that there is pending proceedings against the director of the respondent, one Mr. Joginder Singh for contempt of Court for failure to obey a Court order.

In view of the various orders to be executed by the respondent I am of the view that it is not just and equitable for a winding-up order to be made as the effect of a winding-up order would put a stop to all enforcement proceedings. In any event the petitioner has been unable to show any special circumstances rendering a winding-up order desirable. If no winding-up order is made, she is not totally without any remedy. Even though the respondent, through its director at encl. 25, deposed that the respondent is insolvent, but no evidence was adduced to that effect other than a mere bare statement. It has to be noted that the respondent has yet to account for the money in respect of the sale of the land to Oakfield Enterprise Sdn. Bhd. in view of the fraudulent trading of the respondent as alleged by the opposing creditors.

In another petition filed by one Teong Kai Moi @ Teo Kai Moi (f) *vide* Companies (Winding-Up) No. 28-4 of 1989, against the respondent, Abu Mansor J., dismissed the application with costs on the ground that it was not just and equitable to do so. His Lordship at pp. 5-6, said:

> When one considers the balance of convenience, the interest of the seven judgment creditors far outweighed the interest of the petitioner in having the respondent company to be in existence in order that the respondent company can perform and fulfil its several obligations for the benefit of those judgment creditors who had obtained judgments.

Similarly in this case, a winding-up order would have the undesirable effect of negativing the several Court orders which would work towards the detriment of the opposing creditors.

In the circumstances I am of the view that this is a proper case where I should decline to make a winding-up order and the petitioner is at liberty to enforce her claim by other modes. I therefore dismiss the petitioner's application with costs and I order the costs to be borne by her and the supporting creditors.

ENG SOON PLASTICS CHEMICALS PTE. LTD.

v.

FRIENDTEX INDUSTRIES SDN. BHD.

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUIT NO. 22-133-1992]
26 JANUARY 1994

PRACTICE & PROCEDURE: Order 14 RHC - Whether any triable issues - Sale of goods - Claim on invoices - Part payment made - Defence of unmerchantability and set-off - Whether defendant entitled to reject goods - Whether defence of set-off applicable - Consideration of s. 42 & s. 59 of the Sales of Goods Act 1957 - Technical objections - Whether necessary to reply to facts deposed to in an affidavit - Absence of particulars in statement of claim - Whether fatal - No contractual interest on pre-judgment sum - Whether statute on interest must be pleaded to claim interest.

The plaintiff's claim was for goods sold and delivered at the request of the defendant. Part payment was only made on one of the three outstanding invoices. The plaintiff's solicitors issued a notice of demand. The defendant replied by letter dated 3 March 1992 offering to settle the debt in instalments which proposal was rejected by the plaintiff.

The defendant denied liability on the basis of unmerchantability of the goods supplied and raised the defence of set-off purportedly from a possible claim against it by Cheokson Industry Sdn. Bhd. to whom the plaintiff's goods were supplied by the defendant. The defendant also raised several technical objections.

Held:

[1] On the issue of unmerchantability of the goods it was noted that in spite of prior knowledge of this issue, the defendant failed to intimate this in its letter of 3 March 1992 which contents showed unequivocal admission of the debt owed to the plaintiff. Assuming the claim to unmerchantability of the plaintiff's goods was true, the defendant's conduct in accepting and supplying the goods to Cheokson Industry Sdn. Bhd. and its failure to notify the plaintiff of this issue did not entitle the defendant to reject the goods by virtue of s. 42 of the Sales of Goods Act 1957 (the Act) and the defendant was therefore confined to its remedy in damages. In the circumstances the defendant had no valid